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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 502

ROYAL LA MORA,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

I.

HISTORY OF THE CASE

The Grand Jury of Hamilton County, Ohio, at the January 1949 term, returned an indictment charging Royal La Mora with shooting with intent to kill one Frank Kestler, in the first count, and shooting with intent to wound said Frank Kestler, in the second count, on the 23rd day of February, 1949.

To this indictment the petitioner entered pleas of not guilty and not guilty by reason of insanity at the time of the alleged commission of the crime charged in the in-

dictment. Thereupon the Court committed the petitioner to Lima State Hospital for examination and report and the Superintendent of the Lima State Hospital thereafter filed a written report setting forth that, in his opinion, the petitioner was sane.

The cause then proceeded to trial before the Honorable Charles S. Bell, Judge of the Court of Common Pleas of Hamilton County, Ohio and a jury, and a verdict was returned finding the petitioner not guilty of the first count in the indictment but guilty of shooting with intent to wound under the second count of the indictment.

A motion for a new trial was seasonably filed and after hearing same the Court overruled the motion and sentenced the petitioner to imprisonment in the Ohio Penitentiary for the statutory period.

On appeal to the Court of Appeals of the First Appellate District of Ohio, the judgment of the Trial Court was affirmed.

Thereupon an Appeal As Of Right was filed in the Supreme Court of Ohio and also Motion For Leave To Appeal was filed in that Court and the matter was heard on briefs and oral argument in the Supreme Court of Ohio, following which hearing the judgments of both the Trial Court and of the Court of Appeals were affirmed and the Appeal As Of Right was dismissed and the Motion For Leave To Appeal was denied.

The cause is now before this Court upon an Application by the petitioner for a Writ of Certiorari.

II.

THE FACTS

The evidence introduced in the case showed substantially the following facts:

Royal La Mora, twenty-nine (29) years of age, was working at the Alms Hotel in the City of Cincinnati and had been employed there for several months as a bus boy. Previous to that he had served in the Army and had been in a fight with some officers in the Army and had washed out of flight school; was married but not living with his wife who was living with two children in another City in the East.

At about 3:30 or 4 o'clock in the morning of February 23, 1949, La Mora had been serving a private party in the Alms Hotel on one of the upper floors and during the night had taken one or two drinks of liquor and when he was relieved and the party was over, had not received as large a tip as he desired from the party and had become incensed and abusive. He went into the office of the hotel where he began a tirade against the night auditor regarding his tips and claimed that he was going to get what was coming to him. The night clerk, one John J. O'Connor, then intervened and tried to quiet the petitioner who proceeded to vent his wrath on Mr. O'Connor and O'Connor, endeavoring to quiet the petitioner, tackled him and wrestled him to the floor. Thereupon, Frank Kestler, the private policeman at the Alms Hotel, who was well known to the petitioner as such, intervened and endeavored to restrain the petitioner and held him on the floor while Mr. O'Connor went to the telephone to call the police. As Mr. Kestler was lying on top of the petitioner, his re-

volver was in a holster at the left side of his belt, with the butt pointed forward and the petitioner was able to seize the revolver in his right hand and, giving a terrific lunge, threw Mr. Kestler off his body and arose, forcing Mr. Kestler backward four or five feet away from him, the men, at that time, both being on their feet facing each other and La Mora holding the gun in his right hand, aiming it at Kestler's body. Kestler, fearing for the safety of the guests and other people in the hotel, and disregarding his own personal safety, lunged forward at La Mora almost immediately and seized La Mora's arms at about the middle of the forearm and forced La Mora back to the floor again, lying on his back, with Kestler on top of him and Kestler held him there for a few seconds, during which time La Mora twisted the barrel of the gun around and under and into the lower midsection of Kestler's body, pulled the trigger and fired the shot which wounded Mr. Kestler in the upper leg near the groin. After the shot was fired O'Connor and another employee named Verne White, intervened, seized the gun and called the police while holding La Mora at bay with the gun in a chair until the police arrived. Mr. Kestler recovered from his wound which incapacitated him for several weeks and was able to testify to these facts upon the trial, as did Mr. O'Connor, the night clerk and Mr. Leland Brock, an elevator operator who saw the attack and also Mr. Harold White, the night auditor previously referred to, who was the first man attacked by the petitioner that evening. During the progress of the trial one of the witnesses summoned by the defense, one Wesley Dawson, the headwaiter at the Alms Hotel, testified, on cross examination, that this was not the first time that petitioner had become abusive over a tip, but that approximately two weeks before the shooting

in this case, on a prior occasion, the petitioner had become abusive over not receiving a tip in a similar situation and that in the argument with Mr. Dawson over the same, had grabbed him by the lapels of his jacket and had released him only when Mr. Kestler, the policeman, had approached and quieted the petitioner.

In passing it should be noted that the Statement Of Facts contained in petitioner's brief is incorrect in many respects and counsel has gone far beyond the record set forth in the Bill of Exceptions and the transcript of the proceedings in this case in drafting his Statement of Facts and in referring to proceedings which occurred upon the trial inasmuch as many of the statements claimed to be matters of fact in his brief are not in anyway supported by the record, testimony or transcript of the proceedings in the case. Counsel apparently is drawing rather freely upon his imagination in this respect which may have resulted from the fact that he did not participate in the trial of the case and had no actual firsthand knowledge of the proceedings upon the trial. In addition petitioner, in his Pracecipe For Transcript Of Record and Original Papers directed to the Clerk of the Supreme Court of Ohio, has sought to include many documents which form no proper part of the record on review before this Court and a Motion To Strike such papers from the files of this Court is being filed in an effort to eliminate unnecessary and improper parts of the record. One item in particular is that designated as No. 4 in the Praecipe For Transcript, being a letter from one Dr. Douglas Goldman to Honorable George E. Kearns, Judge of the Court of Common Pleas of Hamilton County, Ohio, dated May 19, 1949, regarding a private opinion concerning the petitioner which was not presented to the Court as evidence and cer-

tainly should not be considered as a part of the record, nor should it form a basis for so-called statements of fact in petitioner's brief. There are numerous other inaccuracies and statements of so-called fact which a perusal of the documents properly a part of the record in this case will readily indicate.

III.

ARGUMENT

a) The petitioner's Application for Writ of Certiorari is based entirely on his claim that counsel must be furnished defendants charged with serious crimes in State Courts who must be sufficiently experienced and competent to give adequate representation to the accused.

The Constitution of the State of Ohio, of course, provides that every defendant in a criminal case involving a felony is entitled to be represented by counsel and the practice is invariably followed in the State and Hamilton County where this case arose of appointing counsel to represent indigent prisoners. *Constitution of Ohio, Article I, Section* 10. The petitioner originally endeavored to employ counsel and the case was delayed in order that proper counsel could be appointed for him when he was not able to retain counsel. Thereafter the matter proceeded to trial and a careful perusal of the record in the case will indicate that all of petitioner's constitutional rights were preserved and that he was ably and most diligently represented throughout. The record actually will indicate that no counsel, however experienced, could have been more diligent or active in protecting every right of the petitioner on the trial of the case and it will show

further that even on preliminary matters in filing a Motion for a Bill of Particulars and in filing the Suggestion of Insanity counsel who handled the trial was most thorough and diligent throughout. The trial judge was a former judge of the Supreme Court of Ohio and a trial judge of vast experience on the bench who safeguarded the petitioner's rights at all times. Three judges of the Court of Appeals, and all judges of the Supreme Court of Ohio, have affirmed the conviction of the petitioner.

One of the points mentioned as indicating the inexperience and inability of the defense counsel was his failure to get into evidence testimony of a psychiatrist regarding a so-called encephalograph. (La Mora record, Narrative Bill of Exceptions, Pages 9 and 10). The record at this point, with reference to the testimony of the psychiatrist, does not show anything with reference to the nature of this examination which could justify the Trial Court in permitting answers to the hypothetical questions presented by defense counsel especially since the questions set forth on Page 10 of this record were not supported by the evidence.

b) Further, in its opinion (Appendix A.) the Ohio Court of Appeals also indicated that the Trial Court had given the petitioner full opportunity to prove the circumstances such as the drinking of intoxicants as bearing upon his intention at the time to kill or wound his victim. To claim that the proceedings on this point indicated inexperience of counsel is of no value because the most experienced lawyer at the bar could not have done otherwise or secured a different result or ruling from the Trial Court on this type of evidence. The Supreme Court of Ohio follows the universally accepted rule of law that voluntary drunkenness is no excuse for the commission of a crime

although drunkenness may be shown as effecting intent and the Trial Court clearly permitted petitioner to testify fully regarding this situation. *Nichols* v. *State,* 8 O.S. 435; *Rucker* v. *State,* 119 O.S. 189, 162 N.E. 802. Crime when all the acts of hand and mind constituting it exist is not the less criminal when committed by a person who is intoxicated. Drunkenness is not insanity nor does it answer to what is termed an unsound mind unless the derangement which it causes becomes fixed by habit or by chronic alcoholism, thereby rendering the party incapable of distinguishing between right and wrong, the same as insanity produced by any other cause. *State* v. *Austin,* 71 O.S. 317; *Pigman* v. *State,* 14 Ohio 555, 45 Am. Dec. 558. In this case, based upon the suggestion of temporary insanity filed by trial counsel, the State of Ohio had the petitioner examined by the members of the staff of the Lima State Hospital for the Criminal Insane and the petitioner was returned as clearly sane and there was no testimony brought forward at all upon the trial to the contrary. That, of course, was the reason that immediately when the first opportunity presented itself trial counsel withdrew his plea of not guilty by reason of insanity since he would have been in an impossible position had the plea remained of record since no evidence whatever was available to substantiate the same. (La Mora record, Narrative Bill of Exceptions, Page 4).

c) Petitioner's counsel cites many cases which may or may not be helpful to the Court in deciding this case. Apparently, however, the specific question presented herein has never come before this Court. The primary consideration, it would appear, is whether or not petitioner actually had a fair trial. A review of the record will show that he was most adequately and ably represented on the

trial. Petitioner's counsel in this Court, not having been present in person, is hardly able to appreciate the proceedings. The question he raises would impose an impossible burden upon this or any other reviewing Court if it were to be recognized as a basis for error. This Court might be called upon in a multitude of cases to determine whether or not trial counsel was sufficiently experienced and, as petitioner's counsel admits in his brief at page 26 thereof, an intolerable situation would result. The record will indicate that three trial judges of the Hamilton County trial bench had official contact with petitioner's counsel. There is no denial that he was admitted to the bar of the Supreme Court of Ohio and the question becomes just how far a Court could or should go in a situation of this sort. To accede to petitioner's point of view would mean that probably no case could be disposed of where one of the attorneys could be claimed to have been "inexperienced".

Petitioner's counsel in this Court indicates that his interest in this case developed after the trial. Actually, both he and his brother, the psychiatrist, were apparently interested in the situation long prior to the three day trial which took place on July 12, 13 and 14, 1949, as evidenced by the letter which he wrote to the Hamilton County Prosecuting Attorney's Office on May 24, 1949 (Appendix C.), in which he indicated that he felt the petitioner was at least guilty of assault and battery and that he was in communication at that time with Mr. Ross, the Court-appointed trial counsel. It would appear that if present counsel for the petitioner was so concerned about Mr. Ross' inexperience that the most logical and proper time to present it to the Court would have been prior to trial, but the question was raised for the first time in the Supreme

Court of Ohio; no mention having been made thereof by present counsel in the Ohio Court of Appeals, which heard the first appeal.

IV.

CONCLUSION

In conclusion we respectfully submit that the petitioner received a fair trial; that the record in all proceedings shows that he was adequately represented; that the basis of this proceeding is nebulous and unsound and that the Application for the Writ of Certiorari should be denied.

Respectfully submitted,

CARSON HOY
Prosecuting Attorney
ROBERT N. ZIEGLER
Ass't. Prosecuting Attorney
Counsel for Respondent

APPENDIX A.

IN THE COURT OF APPEALS
First Appellate District of Ohio.
Hamilton County
No. 7182

STATE OF OHIO,
Appellee,

vs.

ROYAL LA MORA,
Appellant.

OPINION
(October 31, 1949.)

Appeal on Questions of Law, From Court of Common Pleas, Hamilton County, Ohio.

Mr. Carson Hoy and Mr. Robert Ziegler, *for Appellee.*
Mr. Jerome Goldman and Mr. Albert W. Ross, Jr., *for Appellant.*
Mr. Loyal S. Martin, *for Appellant.*

BY THE COURT:

The appellant was indicted on two counts — one of shooting with intent to kill, and the other of shooting with intent to wound. The jury found him guilty of shooting with intent to wound. The court imposed the sentence

for that crime, and this appeal is from that sentence. Many errors are urged.

(1) During the progress of the trial, and after some evidence had been introduced, the defendant's counsel requested the court to have an official stenographer take a record of the proceedings in shorthand. This request was refused on the ground that the request had not been made seasonably.

A supplemental bill of exceptions was filed, whereby it was sought to bring upon the record the fact that there were short-hand reporters available at the time. This supplemental bill is limited to the statement that short-hand reporters were available, the only proof of which is the attached affidavit of defendant's counsel. The supplemental bill is not certified to by the trial judge, and, of course, cannot be considered.

Refusal to grant appellant's request for a short-hand reporter is assigned as error.

Assuming, without deciding, that it was error to refuse the services of a short-hand reporter, the question remains whether the appellant was prejudiced. The purpose of a short-hand reporter is to make a record so that the action of the trial court can be reviewed. If such a record is made otherwise, the purpose is served. And in this case, the appellant presented to the court a narrative bill of exceptions which he prepared and which the trial court certified to without making a single change in the narration. The certificate recited that the narration prepared and presented by the appellant contained "substantially all the proceedings and evidence offered and admitted." A verbatim report would serve no other purpose. We find no prejudicial error.

(2) At the close of the opening statements of counsel, the court, in the absence of the jury, told appellant's coun-

sel that the plea of accidental shooting was inconsistent with the plea of not guilty because of insanity, which he had filed, and that he should elect between them. Counsel for the defendant thereupon withdrew his plea of not guilty by reason of insanity. No objection, exception, or protest of any sort was made at the time. No request was made thereafter for leave to re-enter the plea of not guilty, on the ground of insanity, and the trial proceeded on the general plea of not guilty.

This recital, it seems to us, shows that the appellant is in no position to urge this ground of reversal. It is suggested that appellant's counsel was inexperienced and that perhaps a more experienced trial lawyer would have acted otherwise. None of that appears in the record. A plea of not guilty by reason of insanity carries certain burdens. Acquittal on that ground does not result necessarily in liberty. It is followed by possible incarceration in an insane asylum instead of a penitentiary. That fact might have influenced the appellant in deciding to rely on the general plea of not guilty. There is nothing to show that the withdrawal of the plea was not entirely voluntary.

We find no error in this regard.

(3) The appellant presented Dr. Goldman as an expert and the next assignment relates to his testimony. It seems that Dr. Goldman had examined the appellant with an electroencephalograph. The record does not show what such an instrument is, or its accuracy to determine the susceptibility of the patient to the influence of alcohol, which, apparently, was the purpose. There was no tender of such evidence and the court sustained the objection. We cannot say the court erred in so doing.

A hypothetical question was propounded to Dr. Goldman, to which the court sustained an objection. The hypo-

thetical question contained a reference to a chart showing the result of an examination of the appellant. This chart was never introduced in evidence. We cannot say the court erred in sustaining the objection to the question. This objection is equally applicable to the subsequent question. There were other recitals in both questions not supported by evidence.

In passing on the relevancy of the question, we must keep in mind that the appellant had withdrawn his plea of not guilty by reason of insanity. His defense must be treated as though he had made no such plea. By Section 13,440-2, General Code, it is provided that "A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged." The court gave the appellant full opportunity to prove the circumstances, such as the drinking of intoxicants, reflecting on whether he had an intent to kill or to wound.

(5) The court did not charge on the included offenses of assault and assault and battery, and this is assigned as error. A sufficient answer to this alleged error is that the appellant made no request for such a charge, and took no exception to its omission.

(6) Other complaints are made concerning the charge, but a reading of it shows that it contains an accurate statement of the elements of the crimes alleged and a full exposition of the applicable law.

We find no prejudicial error in the record.

The record shows that the appellant was the aggressor in the affray. In our opinion, the evidence fully justified the conviction.

For these reasons, the judgment is affirmed.

Ross, P, J., Hildebrant & Matthews, J. J. concur.

APPENDIX B.

COURT OF COMMON PLEAS
Hamilton County, Ohio
Criminal Division

No. 58801

STATE OF OHIO,

Plaintiff,

vs.

ROYAL LA MORA,

Defendant.

STIPULATION OF COUNSEL AS TO CORRECTED NARRATIVE BILL OF EXCEPTIONS.

It is hereby stipulated by and between counsel for the State of Ohio and for the defendant in this cause, that the Narrative Bill of Exceptions as corrected by agreement of counsel, with permission of the Court, is a true and correct narrative transcript of the proceedings on the trial of this cause, and the exceptions to the Bill of Exceptions as originally filed, are hereby withdrawn.

ROBERT N. ZIEGLER
Counsel for State of Ohio,
Plaintiff

LOYAL S. MARTIN
ALBERT W. ROSS, JR.
Counsel for Royal La Mora,
Defendant.

APPENDIX C.

JEROME GOLDMAN
Attorney at Law
211 East Fourth Street
Cincinnati, Ohio

May 24, 1949

Samuel A. Rubenstein, Esq.,
Asst. Prosecuting Attorney,
Court House, City.

Dear Sam:

I have obtained copy of the letter sent by my brother, Douglas, to Judge Kearns about which I spoke to you with reference to Royal La Mora.

Douglas also told me that he understood that La Mora had a considerable amount of artistic talent which he is developing by attending the Art Academy. There is no evidence of any active psychotic manifestations; that La Mora was above the average in intelligence, and when sober, fairly well balanced emotionally.

Apparently from what La Mora told Doug, he does not remember much of what took place at the Alms Hotel except that he was under the influence of alcohol and had suffered innumerable blows on the head during the fray. He did not remember at all using a gun. Doug also stated that some of the sources of his unconscious hostilities were explored, and in this the patient cooperated well. He faithfully followed the advice regarding returning to his affiliation with the Catholic Church and also consulted Mr. H. Heekin, of Alcoholics Anonymous regarding drinking.

Doug also told me that the course of treatment of the patient had been curtailed somewhat because of lack of

time on Doug's part particularly, but that he believed that if the sources of the patient's anxiety and hostility are further managed, the danger of any recurrence of alcoholic episodes will be minimal.

Doug was further of the opinion that the proper and consistent way to consider the situation is that a somewhat over-worked individual, fundamentally neurotic rather than psychotic, was put under stress while under the influence of alcohol. This involved some affront to his sense of justice, and he pursued his cause over zealously. The amount and kind of restrictive force which he met was not designed to help him overcome his difficulty but accentuate it. The presence of a gun which he did not induce into the situation was incidental. Had there been no gun, there could have been no shooting, since there was nothing in his character which would indicate such a possibility.

Doug's opinion was that this boy was definitely not a criminal, and that with psychiatric help he should be able to stay away from alcohol and avoid similar trouble in the future; that it definitely would be harmful to him, and no benefit to society to have him imprisoned.

As I said to you, it seems to me that a just way to dispose of this matter would be for La Mora to plead guilty to assault and battery, and relying upon the good sense of the Judge, perhaps on your department's recommendation, to suspend any sentence invoked. The Judge must have felt that this boy was somewhat worthy, as he has been out on his own recognizance.

I shall strongly recommend this course to Mr. Ross, La Mora's attorney.

Yours very truly

(Signed) Jerry

APPENDIX D.

SUPREME COURT OF THE UNITED STATES
October Term, 1949
No. 502

ROYAL LA MORA,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

RECEIPT

Receipt is hereby acknowledged of copy of brief for Respondent in the above entitled cause.

(Signed) JEROME GOLDMAN

May , 1950.